City of Irving

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CITY MANAGER

May 20, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Implementation of Section 302 of the
Telecommunications Act of 1996 --
CS Dkt. No. 96-46

Dear Mr. Secretary:

The City of Irving files this letter to set the record straight as to representations that appear to have been made to the Commission staff with respect to the partial draft of the City's proposed ordinance pertaining to telecommunications providers in the City's rights-of-way. Oral representations were made to the Bureau chief and members of her staff by telephone company representatives at a meeting at which the City was not present and to which the City was not invited, although Southwestern Bell and GTE provide local exchange service in Irving. Under such circumstances there was no prospect of instant correction to sharpen the factual precision of the telephone company representations nor any opportunity for the City to offer a prompt rebuttal.

I. The Incompletely Disclosed Representations

On April 26, 1996, representatives of various domestic carriers "met...with Meredith Jones, John Logan, Gary Laden and Rick Chessen of the Cable Services Bureau to discuss implementation of Section 302 [Cable service provided by telephone

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companies] of the Telecommunications Act of 1996." (Ex parte letter from Karen B. Possner of BellSouth to you, filed April 26th and placed in the public file of Docket No. 96-46 on May 3d)

At that meeting excerpts from a recent partial draft of a generic telecommunications ordinance of the City of Irving were distributed to the staff and discussed by the companies. These excerpts were filed as an attachment to Ms. Possner's April 26th letter. The ordinance as proposed applies to all multi-channel service providers, including open video systems providers, to effect both proper regulation of the public rights-of-way and compliance with the non-discrimination requirements of the Telecommunications Act of 1996. The excerpts of the ordinance that were handed over to the staff seem to have been limited to portions of the definitions section, which incorporates OVS providers in the definition of multi-channel service (MCS) provider, and the substantive section outlining specific in-kind services to the public required of MCS providers as part of the compensation for their being allowed to conduct their businesses for profit in the public's rights-of-way.

Since the City was not present at the ex parte meeting nor was it served with the April 26th letter and further, given the singular lack of context revealed in the April 26th letter regarding such excerpts, the City is left to infer the oral context in which portions of its proposed Ordinance were used. However, based on the OVS public record, which contains extensive comments submitted by GTE, SWBT, and other domestic carriers, as well as a subsequent ex parte letter dated May 2, 1996,[1] the City can fairly infer that the telephone companies have used the excerpts of the City's proposed ordinance to support their argument, unfounded in law, that the Commission should broadly preempt local authority, including the City's, over OVS. Based on the

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[1] The letter was submitted to the Commission to "offer responses to questions raised in [the April 26th ex parte] meeting." Ex Parte letter from Michael A. Tanner of BellSouth Telecommunications, Inc., filed May 2, 1996.

excerpts of the ordinance that were forwarded by letter to the Commission, the City infers that the companies object particularly to the inclusion of OVS operators under the City's generic telecommunications ordinance and further object to any imposition by the City of PEG access requirements and related forms of in-kind compensation that are permitted under the 1996 Act.

As shown below, the companies' arguments favoring preemption of local regulation of OVS providers, particularly PEG access requirements, have no basis in either the language of the Act or its legislative history. These arguments should be wholly rejected by the Commission in order to avoid embroiling itself in the litigational morass on issues of constitutionality and statutory authority that would certainly follow on the heels of the preemptory actions by the Commission to which the companies' representations appear to be directed.

II. Section 253 Forecloses Agency Preemption.

Despite the companies' arguments in favor of limiting the City's authority over its rights-of-way,[2] Section 253(c) explicitly recognizes the City of Irving and other local governments' right both to manage the rights-of-way and to receive fair compensation for their use, provided only that they exercise such rights in a nondiscriminatory and neutral manner.[3] Furthermore, Section 653 of the Act does not limit the Congress' recognition in Section 253(c) of the cities' property rights or the cities' obligation to exercise such rights in a nondiscriminatory manner.

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2 The Joint Parties inaccurately cite § 253(c) for the proposition that the 1996 Act "limits local governments to a managerial role over rights-of-way."

3 (c) STATE AND LOCAL GOVERNMENT AUTHORITY.—Nothing in this section affects the authority or a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

1996 Act, Section 101(a) (adding § 253(c)) (emphasis added).

Despite the desire of the companies to receive special (i.e., "hands off") treatment of their video operations by local governments, the specific language of the 1996 Act obligates the City of Irving and its counterparts to manage their rights-of-way in a nondiscriminatory manner. To go beyond Section 653 in exempting OVS operators from application of a generic ordinance which would apply to all multi-channel service providers, would expose the City to charges of noncompliance with the Act.

III. The City May Derive In-kind Compensation.

The City's right to manage its rights-of-way and "to require fair and reasonable compensation" therefore includes the right to impose duties relating to public, educational, and governmental access. New Section 653(c)(1)(B) provides that Section 611 of the Cable Act, "Cable Channels for Public, Educational, or Governmental Use," shall apply to OVS operators in accordance with regulations to be prescribed by the Commission.[4] Those regulations must ensure that OVS operators fulfill "obligations that are no greater or lesser" than the obligations contained in Section 611.[5] Despite the companies' assertion that the Commission should "fashion an approach to PEG access on open video systems that keeps operators free from local franchise regulation as Congress intended"[6], the legislative history relating to Section 653(c)(1)(B) makes clear that the regulations to be promulgated by the Commission to implement that section must be crafted so as to impose PEG access requirements on OVS that are "equivalent" to the obligations agreed to by cable operators.[7]

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4 1996 Act, Section 302 (adding 47 U.S.C. § 653(c)(1)(B)).

5 Id. at § 653(c)(2)(A).

6 Joint Party Comments at 26, filed in Docket No. 96-46 on April 1, 1996.

7 House Report at 105.

Section 611 of the Cable Act, of course, authorizes each local franchising authority to establish requirements in a franchise for the designation of channel capacity for PEG use, including institutional networks. To establish PEG requirements, the City of Irving has conducted an ascertainment process to determine its individual PEG access needs and interests. These needs and interests are translated into specific requirements for facilities, equipment, and channel capacity are incorporated into a franchise.[8]

The companies have expressed additional concerns that mandatory duplication of PEG requirements ignores the possibility that "OVS facilities may offer different capabilities than existing cable systems and may be able to provide equivalent carriage of PEG programming to that provided by cable operators in the OVS service area by means other than the duplication of facilities."[9] The City's draft anticipated this argument and rebuts it. The draft recognizes that mindless duplication of PEG access facilities and services will not necessarily best satisfy its needs,[10] and it has drafted its ordinance to address this possibility by providing the City Manager with authority to commute any duplicative services into monetary payments.[11] In the OVS context, the commutability provision of the draft ordinance makes it clear that the in-kind services requirement is a form of compensation for right-of-way use rather than a form of regulation.

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8 See 47 U.S.C. §§ 531(b), 546(c)(1)(D).

9 Joint Parties Reply Comments at 26 citing NLC Comments at 31 et. seq..

10 The City believes that the Joint Parties have misread the NLC comments about which they express concern. The NLC's comments provide that an OVS operator should either match services that meets a local governments PEG access needs or negotiate with the local franchising authority to find alternative means that would better address the local government's needs and requirements. Thus, the NLC never requires duplication of services without alternatives

11 Proposed Ordinance, Section 73(F).

As in the multi-channel service context, such dedicated PEG channels and facilities and institutional networks[12] constitute a form of in-kind compensation to be rendered to the City of Irving by all multi-channel service providers for use of the City's rights-of-way. This form of compensation to the City of Irving is in addition to any fees based on gross receipts that may be required. Such facilities and local requirements contribute directly to the development of the City's information infrastructure, filling the gaps that would otherwise be left by commercial networks. Similarly, institutional networks make feasible the dissemination of computerized information by local governments to citizens. To the extent that the populations of cable subscribers and OVS subscribers do not overlap, the form of coordination specified in Section 73 are necessary to preserve the ability of PEG services to reach the City's citizenry. Thus, the in-kind compensation agreed to in cable and other multi-channel service providers franchises helps serve the purposes of the Act.[13]

To argue, as the companies do, that the fee-in-lieu is the sole compensation to be provided to local authorities under OVS,[14] is to misread the statute. Section 653 simply substitutes this fee-in-lieu for the franchise fee applicable to cable operators under Section 622 of the Cable Act, with the apparent intent of matching the franchise fee burdens on OVS and cable competitors. Section 653 nowhere suggests in any way that the fee-in-lieu, in and of itself, is sufficient compensation for the OVS operator's use of the public rights-of-way. Nor does Section 653 prohibit in-kind compensation.[15]

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12 These are explicitly authorized under federal law with respect to cable operators 47 U.S.C. §§ 531 and 544 and are otherwise authorized as part of the City's authority under state and federal law over the rights-of-way.

13 See, e.g., 1996 Act, sections 706-708 (incentives to promote advanced telecommunications services to schools in particular).

14 See Joint Parties Reply Comments, page 30.

15 Furthermore, Section 253(c) of the Act affirms the right of local governments to "fair and reasonable compensation" (emphasis added) for use of their rights-of-way.

Thus, the total compensation multichannel service providers pay for use of the local public rights-of-way, then, consists of both franchise fees and the additional types of compensation described above. Again, the City suspects that the companies simply desire to obtain Commission approval of additional exemptions for which there is no authority under the Act.

IV. The 1996 Act Does Not Exempt OVS Operators from Requirements Other Than the Title VI Franchise Requirement

In their May 2nd ex parte letter, the companies repeat their argument that any Commission action that fails to preempt local authority would "effectively reinstate local franchise regulation and would eliminate any incentive to deploy open video systems." [16] First, the companies repeatedly fail to recognize that local franchising authority is a product of state and local law and such laws can only be preempted with authorization by Congress, either express or implied.[17] The Act contains no express preemption language in either Section 653 or Section 253 of the Act, and neither does the Act contained any implied authority to preempt [18] Section 653(c) exempts an OVS from Section 621 — the federal law requirement that a cable operator may not provide cable service without a state-law "franchise," as defined in Title VI. However, exempting OVS from the Section 621(b) requirement of a local cable franchise has no effect whatsoever on any requirement under the laws of the State of Texas or the City

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16 May 2, 1996 Ex Parte Letter at 3. Joint Parties allege that the OVS statutory provisions represent an "explicit" preemption of all franchise requirements. Joint Parties Reply Comments at 30, 33-34.

17 See Jones v. Rath Packing Co., 430 U.S. 519 (1977) (Congress must clearly authorize express preemption.) See also Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (discussing implied preemption).

18 Implied preemption could occur in only two ways: either by actual conflict between federal and state or local law (See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) or by an expression of congressional intent to preempt an entire field of regulation. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). Neither is applicable here. See further discussion NLC Reply Comments p. 40 et.seq.

for authorization to be in the public rights-of-way, whether or not denominated a "franchise," and whether or not related to cable television.

Title VI did not create the City of Irving's franchising authority. Rather its franchising authority is derived from its property interests under state and local law. The City was granting franchises, including cable franchises, long before Section 621(b) was enacted; Title VI merely added a new federal law requirement for cable systems. Moreover, Title VI never purported to deprive the City of Irving or any community of the right to franchise the use of its public rights-of-way, whether for cable, telephone, street railways, or any other use of local streets. The companies are thus asking the Commission to venture onto entirely new and treacherous legal ground in the OVS rules by supposing that an exemption from a federal franchising requirement may be bootstrapped into a far broader preemption of all state and local law franchising requirements.[19]

A "franchise" is the mechanism through which a local government controls and receives compensation for use of its rights-of-way Indeed, outside the cable-specific context of the Title VI "franchise" definition, a "franchise" is more generally defined as a negotiated long-term contract between a private enterprise and a governmental entity for the use of public property in a private business.[20]

Thus, any attempt to restrict the City's general franchising authority (independent of the cable franchise requirement of Title VI) would effectively usurp the City's rights to control its rights-of-way and would effect a taking under the Fifth

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19 For the same reasons, the LECs' attempt to dodge the Bell Atlantic collocation case, Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), is fruitless. Joint Parties Reply Comments at 34 n.93. The franchise requirement of the Cable Act, from which an OVS operator is exempted, is distinct from any other franchise requirements that may obtain under state and local law, about which the statute is silent.

20 See, e.g., Santa Barbara County Taxpayers' Ass'n v. Board of Supervisors, 209 Cal. App. 3d 940, 949, 257 Cal. Rptr. 615, 620 (1989).

Amendment. The Commission lacks authority under the Anti-Deficiency Act, 31 U.S.C. § 1341, to effect such a taking.

We concur with the NLC arguments in this docket that the Act contains no authority either explicit or by necessary implication to support the ability of the Commission to effect a taking of property.[21] Thus, unlike the LECs who carelessly urge the Commission to disregard the grave Fifth Amendment implications, the City urges the Commission to avoid raising serious Fifth Amendment issues by recognizing its only role with respect to local and state authority over the rights-of-way is to ensure that LECs have properly certified that they have obtained proper authorization to use such rights-of-way. In this way, the Commission properly regulates within the scope of the Act constructed by Congress and avoids the creation of both a great financial risk upon the U.S. Treasury for payments of just compensation and the extensive delays in implementation of the OVS program which would result from such takings litigation.

V. Conclusion

The City has acted reasonably in proposing a generic telecommunications ordinance in response to demands on the space available in its rights-of-way. It is currently involved in renewal proceedings with two cable franchises. It has a multiplicity of providers -- old and new -- to accommodate in its rights-of-way. It is faced with the obligation to treat them comparably under new Section 253(c). Ironically GTE and SWBT came into possession of the draft ordinance, because the City distributed copies at the informal, public meeting of telecom providers convened to solicit their suggestions on the course of action proposed by the City. Instead of receiving comments from the companies, the City finds its good faith efforts to solicit

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21 See NLC Comments at 58 et.seq..

the comments of the providers used by some of them as weapon to attack its approach behind its back.

The City believes that its approach is conceptually sound and still solicits the views of the providers as to the manner of implementation. We trust that the Commission, having now been given a more balanced exposure to the facts, concurs.

Respectfully submitted,

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cc: The Honorable Mayor Parrish
and Members of the Irving City Council
Karen B. Possner, Esq., BellSouth
Meredith Jones, FCC
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